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Nos. 96-989, 96-1028, 96-7227 and 96-7265

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAIME CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

KEVIN A. WHITECLIFF, PETITIONER

v.

UNITED STATES OF AMERICA

BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, AND GRAEME LEONARD CRADDOCK, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL GORDON FATTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly affirmed the convictions of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1), even though the jury acquitted petitioners of the predicate crime of conspiring to murder federal officers.

2. Whether the type of firearm that is used or carried by an offender during and in relation to the predicate crime is a sentencing enhancement factor, rather than an element of the offense, under 18 U.S.C. 924(c)(1).

3. Whether petitioners' sentences under 18 U.S.C. 924(c)(1) may be enhanced based on their co-conspirators' use, during the predicate crime, of firearms requiring an enhanced sentence.

4. Whether petitioner Whitecliff was entitled to a jury instruction that self-defense or the defense of others was a defense to voluntary manslaughter.

5. Whether the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, empowered Congress to enact 18 U.S.C. 922(*o*), which makes it a federal offense to transfer or possess a machinegun.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-116a)[1] is reported at 91 F.3d 699. The opinion of the district court (Pet. App. 119a-141a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1996. A petition for rehearing was denied on September 25, 1996. Pet. App. 117a-118a. The petition for a writ of certiorari in No. 96-989 was filed on December 19, 1996; the petition in No. 96-1028 was filed on December 23, 1996; the petition in No. 96-7227 was filed on December 20, 1996; and the petition in No. 96-7265 was filed on December 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1993, a grand jury sitting in the United States District Court for the Western District of Texas returned a superseding indictment charging petitioners and six co-defendants with conspiring to murder federal officers (Count 1), in violation of 18 U.S.C. 1117; and murdering federal officers (Count 2), in violation of 18 U.S.C. 1111 and 1114. All six petitioners, along with four co-defendants, were also charged with using and carrying a firearm during and in relation to a crime of violence (Count 3), in violation of 18 U.S.C. 924(c)(1). Petitioner Craddock was separately charged with possessing an unregistered destructive device (Count 7), in violation of 26 U.S.C. 5861(d); and with conspiring to do so (Count 8), in violation of 18 U.S.C. 371. Petitioner Fatta was separately charged with conspiring to possess machineguns (Count 9), in violation of 18 U.S.C. 371; and with possessing machineguns (Count 10), in violation of 18 U.S.C. 922(o). Pet. App. 4a-5a.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 96-989.

Following a jury trial, petitioners Castillo, Whitecliff, Branch, and Avraam were convicted on Count 2 of the lesser-included offense of voluntary manslaughter of federal officers, in violation of 18 U.S.C. 1112 and 1114. In addition, petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock were each convicted on Count 3 of using and carrying a firearm during and in relation to a crime of violence. Petitioner Craddock was also convicted on Count 7 of possessing an unregistered destructive device. Petitioner Fatta was convicted on Counts 9 and 10 of conspiring to possess machineguns and possessing machineguns. Pet. App. 5a-6a.

Petitioners Castillo, Whitecliff, Branch, and Avraam were each sentenced to 40 years' imprisonment, to be followed by five years of supervised release. Castillo, Whitecliff, and Branch were fined $2,000; Avraam was fined $10,000. Petitioner Craddock was sentenced to 20 years' imprisonment, to be followed by five years of supervised release, and fined $2,000. Petitioner Fatta was sentenced to 15 years' imprisonment, to be followed by three years of supervised release, and fined $50,000. In addition, petitioners were ordered to pay restitution of $637,607.49 to the Bureau of Alcohol, Tobacco, and Firearms, and $494,080 to the Public Safety Officers Benefit Program of the U.S. Department of Justice. Pet. App. 78a, 142a-151a; 96-1028 Pet. App. 3a-14a; 96-7227 Pet. App. 144a-173a; 96-7265 Pet. App. 123a-128a.

The court of appeals affirmed petitioners' convictions on all counts, vacated petitioners' sentences on Count 3 and remanded for resentencing, and affirmed petitioners' sentences on the other counts. Pet. App. 1a-116a.

1. On February 28, 1993, 76 agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) attempted to execute an arrest warrant for Vernon Wayne Howell and a search warrant for a large compound known as Mount Carmel outside Waco, Texas. Howell, who had changed his name to David Koresh, was the leader of the Branch Davidians, a religious sect that resided at the compound.

Koresh taught at daily Bible studies that the Branch Davidians would be "translated" into heaven following an apocalyptic confrontation between the Branch Davidians and outsiders, whom he referred to as "the beast" and "the enemies." Koresh instructed the Branch Davidians to prepare for the final battle and preached that, "if you can't kill for God, you can't die for God." In anticipation of an imminent violent confrontation with the outsiders, Koresh and the Branch Davidians had stockpiled weapons and ammunition. Pet. App. 2a-3a; Gov't C.A. Br. 4-10.

Approximately 45 minutes before the ATF agents arrived on February 28, 1993, undercover ATF Agent Roberto Rodriguez, who was posing as a possible convert, visited Koresh inside the Branch Davidian compound. During their conversation, Koresh was informed that he had a telephone call and left the room. When Koresh returned, he was shaking and shivering. Koresh told Rodriguez: "[N]either the ATF or National Guard will ever get me. They got me once, they'll never get me again." Koresh then looked out the front windows and repeated: "They're coming, Robert. The time has come." After Rodriguez left the compound, Koresh and other Branch Davidians prepared for a raid. Several men changed into black clothing and retrieved their weapons. The women were told to go to the chapel, but none of the men were there. Koresh came into the chapel wearing a black magazine vest and carrying an AK-47 assault rifle, and he told the women to go back to their rooms and watch. Pet. App. 3a, 16a-17a, 66a-67a; Gov't C.A. Br. 10-15.

Around 9:30 a.m., the ATF agents arrived at the Branch Davidian compound in two cattle trailers that were covered with tarp. After several agents stepped out of one of the trailers and approached the double front doors at the compound's entrance, gunfire erupted from behind the doors and from the windows along the front of the compound. The gunfire continued as the agents exited the two trailers and tried to approach the compound. During that period, three helicopters attempted to create a visual di-

version by flying towards the back of the compound. When the helicopters approached the compound, all three were hit by gunfire. The helicopters immediately left the area. Pet. App. 3a-4a; Gov't C.A. Br. 15-28.

When the gunshots erupted from the compound, the ATF agents at the front of the compound returned fire. Meanwhile, another group of agents proceeded down the right side of the compound. As two teams of agents climbed ladders onto the roof, they heard gunfire cracking around their heads. The first team attempted to enter the window that the agents believed led to Koresh's living quarters, but gunfire erupted through the window and the surrounding wall. Three agents from the second team entered a second window that they believed led to the room where Koresh stored his weapons and ammunition. When gunfire erupted from around the doorway and the opposite wall in the room, the agents returned fire and then escaped back through the window. Gov't C.A. Br. 33-38.

The gun battle between the ATF agents and the Branch Davidians lasted nearly two hours. During the battle, Agents Steven Willis, Conway LeBleu, Todd McKeehan, and Robert Williams were killed by gunfire from the compound. Pet. App. 4a; Gov't C.A. Br. 28-30, 34-35, 38, 40.

After a cease-fire was negotiated, Koresh and the Branch Davidians refused to leave the compound. Agents of the Federal Bureau of Investigation (FBI) then surrounded the compound and began negotiations with Koresh. Koresh instructed the Branch Davidians to open fire if the FBI agents attempted to enter the compound. Following a 51-day stand-off, the FBI attempted to induce Koresh and the remaining Branch Davidians to leave the compound by injecting tear gas on the morning of April 19, 1993. Around noon, Koresh and some of his followers ignited fires that set the compound ablaze. Although a few Branch Davidians escaped, nearly all of the Branch Davidians remaining in the compound died as a result of the fire or fatal gunshot wounds. Pet. App. 4a, 68a-69a; Gov't C.A. Br. 42-55.

2. The evidence at trial showed that petitioner Castillo retrieved his AR-15 assault rifle and joined Koresh and several other Branch Davidians at the front doors of the compound when the ATF agents arrived on February 28, 1993. After the gun battle began, Castillo tried to chamber a round in his rifle, but it jammed. He then retrieved a pistol from his room and went down the hall to another room on the first floor. Marjorie Thomas, a Branch Davidian who testified for the government at trial, saw Castillo with a gun at the end of the corridor on the second floor for a brief period of time. After the cease-fire was declared, Castillo retrieved an AK-47 assault rifle from the kitchen and stood guard at the kitchen door. When ATF Agents Kenneth Chisholm and Bernadette Griffin went into the interior courtyard to rescue an ATF agent who had fallen off the roof, Castillo briefly pointed his rifle at Agent Griffin. During the stand-off, Castillo stood guard with an AK-47 assault rifle in his room on the first floor. Pet. App. 59a-61a, 67a, 69a, 71a-72a; Gov't C.A. Br. 15, 44-46, 65-66. Castillo escaped from the compound during the fire on April 19, 1993. Texas Rangers later found a hand grenade in the assault vest that Castillo had taken off after he came out of the burning building. Gov't C.A. Br. 51-52, 125.

The evidence at trial showed that petitioner Whitecliff shot at the helicopters during the gun battle on February 28, 1993. During the stand-off, Whitecliff stood guard in the chapel with Thomas and petitioner Branch; he was armed with an FN-FAL .308 caliber rifle. Thomas overheard Whitecliff tell Branch, Castillo, and another resident that he had shot an agent during the gun battle. Pet. App. 61a-62a, 67a, 69a, 71a; Gov't C.A. Br. 40-41, 44-45, 64. Whitecliff left the compound during the stand-off on March 19, 1993. Gov't C.A. Br. 46.

The evidence at trial showed that petitioner Branch shot a rifle at the ATF agents from rooms on the second floor of the compound during the gun battle on February 28, 1993. Victorine Hollingsworth, a second Branch

Davidian who testified for the government at trial, heard Branch exclaim during the gun battle that "He nearly got me and I got one." Kathryn Schroeder, a third Branch Davidian who testified for the government at trial, heard Branch running around and yelling in the hallway on the first floor during the gun battle. During the stand-off, Branch stood guard in the chapel in the compound with Thomas and petitioner Whitecliff; he was armed with an M-1A .308 caliber rifle. Thomas overheard Branch tell Whitecliff, Castillo, and another resident that he had shot an agent during the gun battle. Pet. App. 58a-59a, 67a, 69a, 71a; Gov't C.A. Br. 31, 33, 40, 44-46, 63-64, 123-124. Branch left the compound during the stand-off on March 19, 1993. Gov't C.A. Br. 46.

The evidence at trial showed that petitioner Avraam fired a .50 caliber rifle at the ATF agents from the gymnasium on the right rear side of the compound during the gun battle on February 28, 1993. During the stand-off, Avraam stood guard in the areas above the gym and chapel; he was armed with a .50 caliber rifle. He escaped from the compound during the fire on April 19, 1993. After his arrest, Avraam told a fellow inmate that he had a fully automatic weapon while he was at the compound. Pet. App. 57a-58a, 67a, 69a, 72a; Gov't C.A. Br. 44-45, 51-52, 66, 124.

The evidence at trial showed that petitioner Craddock saw Koresh meeting with undercover ATF Agent Rodriguez on the morning of February 28, 1993, and he overheard Koresh saying, "They're coming, they're coming." Shortly afterwards, another Branch Davidian told Craddock that 75 ATF agents had arrived at the airport and that there might be a raid. Craddock returned to his room on the first floor, changed into his black clothing, and retrieved his AR-15 assault rifle. Craddock then went to the kitchen and loaded his 9 mm. handgun with ammunition, but Koresh told him to stay in his room. During the stand-off, Craddock stood guard in Schroeder's bedroom on the first floor; he carried an AR-15 assault rifle and wore a holster with his 9 mm. pistol. Craddock escaped from the

compound during the fire on April 19, 1993. He admitted to the Texas Rangers that Koresh had given him a hand grenade on the morning of the fire. After the fire, Texas Rangers found a live hand grenade in the cinder block building in which Craddock had taken refuge when he escaped from the compound. Pet. App. 68a, 69a; Gov't C.A. Br. 12-14, 44-45, 51, 53, 72, 125.

The evidence at trial showed that petitioner Fatta purchased semiautomatic firearms, magazines, ammunition, and other equipment for the Branch Davidians during the two years before the ATF raid. He also participated in the conversion of semiautomatic firearms into fully automatic firearms. Some of the gun parts, conversion kits, tools, and other equipment used to convert the firearms were shipped to the address of the Mag Bag, a garage located a short distance from the compound. In February 1992, Fatta obtained a Texas sales tax permit for the Mag Bag; on the application he listed himself as the owner and indicated that gun and firearm accessories were the primary product of the Mag Bag. After the fire on April 19, 1993, Texas Rangers found two firearms purchased by Fatta that had been converted to fully automatic firearms. They also found a package of Fatta's personal checks in the machine room in the compound where the Branch Davidians had converted firearms and manufactured hand grenades. Pet. App. 75a-76a; Gov't C.A. Br. 6-9, 55-56, 76-77. Fatta was at a gun show on February 28, 1993, when the ATF agents raided the compound. An arrest warrant was issued for Fatta in early March 1993, and Fatta became a fugitive. He surrendered to the Texas Rangers several weeks later in Houston, Texas. Gov't C.A. Br. 42.

3. Counts 9 and 10 of the indictment charged petitioner Fatta with conspiring to possess machineguns, in violation of 18 U.S.C. 371, and with possessing machineguns, in violation of 18 U.S.C. 922(*o*). Before trial, Fatta moved to dismiss Counts 9 and 10 on the ground that Congress had exceeded its power under the Commerce Clause in enacting 18 U.S.C. 922(*o*). The district court denied the

motion. Pet. App. 7a; 96-7265 Pet. App. 121a-122a. At trial, the jury found Fatta guilty on both counts. Pet. App. 6a; Tr. 7406-7407.

4. Count 2 of the indictment charged all six petitioners with murdering federal officers, in violation of 18 U.S.C. 1111 and 1114.[2] At trial, the district court charged the jury that one of the essential elements of that offense was that the defendant did not act in self-defense or defense of another. Pet. App. 8a; Jury Instructions 32.[3] The court then instructed the jury on the lesser-included offense of voluntary manslaughter under 18 U.S.C. 1112 and 1114. Jury Instructions 44-46. In setting forth the elements of that offense, the court did not instruct the jury that the government was required to prove beyond a reasonable doubt that a defendant did not act in self-defense or defense of another. *Id.* at 44. Petitioners objected to the omission of an instruction that the government was required to prove, as one of the elements of voluntary manslaughter, that a defendant did not act in self-defense or defense of another. Pet. App. 8a; Tr. 7017.[4] The jury found peti-

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[2] Section 1114 provides that whoever kills or attempts to kill designated officers and employees of the United States engaged in or on account of their official duties "shall be punished, in the case of murder, as provided under section 1111, or, in the case of manslaughter, as provided under section 1112." ATF agents are protected by Section 1114. See *United States* v. *Nabors*, 901 F.2d 1351, 1356-1357 (6th Cir.), cert. denied, 498 U.S. 871 (1990); *United States* v. *Alvarez*, 755 F.2d 830, 840-841 (11th Cir.), cert. denied, 474 U.S. 905 (1985), 482 U.S. 908 (1987).

[3] The district court's jury instructions were not fully transcribed as part of the trial transcript. Tr. 7043-7044, 7364-7366. The court's written jury instructions that were distributed and read to the jury were filed and made part of the record.

[4] At the jury charge conference, petitioners asked the district court to instruct the jury that self-defense is a defense to voluntary manslaughter, and the court responded that it would "give that some thought." Tr. 6950-6952, 7000-7001. After the court revised the jury charge, petitioners objected to the omission of a self-defense instruction with respect to the offense of voluntary manslaughter. The court did

tioners Castillo, Whitecliff, Branch, and Avraam guilty on Count 2 of the lesser-included offense of voluntary manslaughter. Pet. App. 6a; Tr. 7404-7405.

5. Count 1 of the indictment charged petitioners with conspiring to murder federal officers, in violation of 18 U.S.C. 1117. Count 3 charged each petitioner with using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). The predicate crime of violence alleged in Count 3 was the conspiracy to murder federal officers charged in Count 1. 96-7227 Pet. App. 176a. The court instructed the jury that an element of the Section 924(c)(1) offense was "[t]hat the Defendant under consideration committed the crime alleged in Count One of the Indictment." *Id.* at 177a. The jury was further instructed that "[t]he term 'firearm' means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." *Ibid.* The jury found petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock not guilty on Count 1 but guilty on Count 3. Pet. App. 6a; Tr. 7405-7406.

6. On June 16 and 17, 1994 the district court held a sentencing hearing. At the hearing, the court read into the record its written sentencing findings. Pet. App. 119a-141a; 6/16-17/94 Tr. 200-219. The court concluded that petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock, who were each convicted on Count 3 of using and carrying a firearm during and in relation to the conspiracy to murder federal officers charged in Count 1, were subject to enhanced 30-year sentences under 18 U.S.C. 924(c)(1).[5] Pet. App. 121a-134a. Relying on the "fortress

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not respond to the objection. Pet. App. 8a; Tr. 7017. The court read most of the jury charge, including the instructions on the elements of the offenses, to the jury before closing arguments, and no further objections were raised at that time. Tr. 7043-7044.

[5] Under Section 924(c)(1), a defendant convicted of using or carrying a firearm during and in relation to a crime of violence shall be sentenced to five years' imprisonment. Section 924(c)(1) further provides, however, that, "if the firearm is a machinegun, or a destructive device,

theory," the district court found that "[t]he evidence established the existence of not only a figurative but a literal fortress, manned by each of the [petitioners] convicted on this count." *Id.* at 123a-124a. Based on that evidence, the court concluded that "[e]ach [petitioner] either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege." *Id.* at 124a. Alternatively, the court concluded that each defendant could be held accountable for a co-conspirator's use of an enhanced weapon under the principles of *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Pet. App. 125a-127a. The court found it "clear that the use of fully automatic weapons, and probably grenades and silencers, was foreseeable and foreseen by all of the [petitioners], who were taught, who planned, and who practiced for just such an outcome." *Id.* at 127a.

The district court rejected petitioners' arguments that imposition of the enhanced 30-year sentence for using or carrying machineguns required a jury finding as to the type of firearm used or carried. Pet. App. 127a-134a.

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or is equipped with a firearm silencer or firearm muffler," the defendant shall be sentenced to 30 years' imprisonment.

The term "firearm" is defined to mean "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." 18 U.S.C. 921(a)(3).

Section 921(a)(23) provides that "[t]he term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b))." 18 U.S.C. 921(a)(23). That Section defines "machinegun" to include "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

The term "destructive device" is defined in 18 U.S.C. 921(a)(4). The terms "firearm silencer" and "firearm muffler" are defined in 18 U.S.C. 921(a)(24).

Based on "the plain language of the statute, and the Supreme Court's determination of the elements" of the offense in *Smith* v. *United States*, 508 U.S. 223, 227-228 (1993), the court concluded that "the type of weapon is not an element of the offense." Pet. App. 129a-130a.

Petitioners Castillo, Whitecliff, Branch, and Avraam were each sentenced to 30 years' imprisonment on Count 3, to run consecutively to their ten-year sentences on Count 2. Pet. App. 78a, 144a; 96-1028 Pet. App. 6a; 96-7227 Pet. App. 146a, 156a. The district court concluded that Craddock was also subject to a 30-year sentence on Count 3, but it "depart[ed] downward" from the sentence required by the statute and sentenced Craddock to ten years' imprisonment on Count 3, to run consecutively to his ten-year sentence on Count 7.[6] Pet. App. 78a; 96-7227 Pet. App. 166a; 6/16-17/94 Tr. 230-232.

7. The court of appeals affirmed petitioners' convictions on all counts, vacated petitioners' sentences on Count 3 and remanded for resentencing, and affirmed petitioners' sentences on the other counts. Pet. App. 1a-116a.

a. The court rejected petitioner Fatta's contention that his convictions on Counts 9 and 10 were invalid because Congress had exceeded its power under the Commerce Clause in enacting 18 U.S.C. 922(*o*). Pet. App. 7a. Noting that the issue was pending before the en banc court in *United States* v. *Kirk*, 70 F.3d 791 (1995), reh'g en banc granted, 78 F.3d 160 (5th Cir. 1996), the court observed that "[t]he en banc court's resolution of this issue will govern the ultimate validity of Fatta's convictions on Counts 9 and 10." Pet. App. 7a. The court upheld Fatta's convictions "[u]nder pre-*Kirk* caselaw now binding this panel," but decided to "hold the mandate pending decision in *Kirk*." *Ibid.*[7]

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[6] The government did not file a timely notice of appeal with respect to Craddock's sentence on Count 3.

[7] Subsequent to the court of appeals' decision in the instant cases, an equally divided en banc court in *Kirk* affirmed the judgment of the

b. The court of appeals rejected the contention of petitioners Castillo, Whitecliff, Branch, and Avraam that they were entitled to an instruction on self-defense and defense of another with respect to the lesser-included offense of voluntary manslaughter under Count 2. Pet. App. 8a-30a. It observed that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Id.* at 8a (quoting *Mathews* v. *United States*, 485 U.S. 58, 63 (1988)).

Applying that standard, the court "review[ed] the record cognizant that the 'merest scintilla of evidence' in the defendant's favor does not warrant a jury instruction regarding an affirmative defense for which the defendant bears the initial burden of production." Pet. App. 9a. It explained that "[a] district court cannot refuse to give an instruction for which there is sufficient evidence in the record for a reasonable juror to harbor a reasonable doubt that the defendant did not act in self defense, but the district court is not required 'to put the case to the jury on a basis that "essentially indulges and even encourages speculations."'" *Id.* at 10a (quoting *United States* v. *Collins*, 690 F.2d 431, 438 (5th Cir. 1982), cert. denied, 460 U.S. 1046 (1983)). The court also noted that the district court's decision to give a self-defense instruction with respect to the murder charge "seed[ed] no right to a similar plea of self-defense to voluntary manslaughter." *Id.* at 16a. To justify a self-defense instruction in this case, the court concluded, "[t]here must be sufficient evidence from which a reasonable juror might infer, at a minimum, either that 1) [petitioners] did not know the ATF agents' identity, or that 2) the ATF agents' use of force, viewed from the perspective of a reasonable officer at the scene, was objectively unreasonable under the circumstances." *Ibid.* (citation omitted).

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district court upholding the constitutionality of Section 922(*o*). See *United States* v. *Kirk*, 105 F.3d 997 (5th Cir. 1997).

The court of appeals held that "the evidence did not require the proposed self-defense instruction." Pet. App. 16a. "Viewing the record as a whole and in the light most favorable to [petitioners]," the court was "not persuaded that a reasonable juror could harbor a reasonable doubt that [petitioners] knew the approaching ATF agents' identity." *Id.* at 19a. The court found that "[t]he record also belies the contention that the ATF agents used excessive force." *Id.* at 20a. The court explained that "[t]he evidence does not permit any reasonable inference but that the Davidians fired the first shots that morning." *Ibid.* The court also pointed out that "evidence that the ATF fired first without evidence that such fire was indiscriminate or otherwise excessive [would] not warrant a self-defense instruction." *Id.* at 27a. It found "no evidence that any of the [petitioners] either came under indiscriminate, unprovoked fire or knew that such fire was taking place." *Id.* at 28a. The court rejected petitioners' claim that excessive force was inherent in the nature of the ATF raid, noting that "a citizen may not initiate a firefight solely on the ground that the police sent too many well-armed officers to arrest him." *Id.* at 29a-30a. The court accordingly concluded "that the district court did not err in refusing to instruct the jury on self-defense and the defense of another with regard to the voluntary manslaughter charge." *Id.* at 30a.

c. The court of appeals rejected the contention of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock that their convictions on Count 3 for using and carrying a firearm during and in relation to a crime of violence were invalid because the jury had acquitted them on Count 1 of the predicate crime of conspiring to murder federal agents. Pet. App. 65a. The court explained that "[i]t is only the fact of the offense, and not a conviction, that is need[ed] to establish the required predicate." *Ibid.* (quoting *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990)). The court acknowledged that petitioners' Section 924(c)(1) convictions

could not stand if there was insufficient evidence to support a jury finding that petitioners conspired to murder federal officers. *Id.* at 64a. The court concluded, however, that "[t]he record is replete with evidence of a conspiracy to murder federal agents and each individual [petitioner's] membership in that conspiracy." *Id.* at 65a.

d. The court of appeals rejected the contention of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock that the district court had improperly imposed enhanced 30-year sentences under Section 924(c)(1) based on the use of machineguns by other members of the conspiracy. Pet. App. 78a-85a. The court observed that "[t]he validity of the district court's action turns upon whether § 924(c)(1)'s machinegun provision creates a separate, independent offense or is a sentence-enhancement provision." *Id.* at 80a. Based on the statute's structure and legislative history, the court ruled that "the machinegun clause of § 924(c)(1) is a sentence-enhancement provision." *Id.* at 81a. It therefore concluded that "[t]he Government need not charge in the indictment nor must the jury find as part of its verdict the particular type of firearm used or carried by the defendant." *Id.* at 85a.

The court of appeals nevertheless vacated petitioners' enhanced sentences on Count 3 and remanded for resentencing. Pet. App. 85a-86a. It observed that the district court had made no findings as to whether machineguns had been "actively employed" within the meaning of *Bailey* v. *United States*, 116 S. Ct. 501 (1995), which was decided during the pendency of petitioners' appeal. Pet. App. 86a. The court concluded that "[w]ith *Bailey* the district court must take another look and enter its findings regarding 'active employment.'" *Ibid.* The court explained that, "[s]hould the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Ibid.* The court also noted that "the district court should consider whether [petitioners] actively employed [an enhanced]

weapon during and in relation to the conspiracy to murder federal agents." *Ibid.*[8]

District Judge Schwarzer, sitting by designation, dissented. Pet. App. 98a-116a. He concluded that the district court had abused its discretion in failing to give an instruction on self-defense and defense of another with respect to the lesser-included offense of voluntary manslaughter under Count 2. *Id.* at 98a-109a. District Judge Schwarzer also concluded that the convictions of petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock on Count 3 for using and carrying a firearm during and in relation to a crime of violence should be reversed because the evidence at trial was insufficient to show that those petitioners had committed the predicate crime of conspiring to murder federal agents. *Id.* at 114a-116a.[9]

8. The court of appeals denied petitioners' petition for rehearing and rejected their suggestion for rehearing en banc. The panel expressly rejected the claim that its decision upholding petitioners' convictions under Section 924(c)(1) on Count 3 despite their acquittals on Count 1 conflicted with *United States* v. *Lucien*, 61 F.3d 366 (5th Cir. 1995). Pet. App. 117a-118a. The panel concluded that

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[8] The court of appeals also rejected claims by petitioners that the district court had improperly accepted the jury's guilty verdict on Count 3 (Pet. App. 31a-38a); that the district court had abused its discretion in sua sponte empaneling an anonymous jury (*id.* at 38a-44a); that the district court had abused its discretion by admitting into evidence some of petitioner Castillo's post-arrest statements but excluding others (*id.* at 45a-56a); that the evidence was insufficient to sustain petitioners' convictions on each count (*id.* at 56a-78a); and that the district court had improperly calculated their sentences under the Sentencing Guidelines (*id.* at 86a-98a). Petitioners do not renew any of those claims here.

[9] District Judge Schwarzer also concluded that the district court had abused its discretion in excluding from evidence a portion of petitioner Castillo's post-arrest statement. Pet. App. 109a-114a. Castillo does not renew that claim here.

petitioners' "remaining contentions [were] also without merit." *Id.* at 118a.

ARGUMENT

1. Petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock contend (96-989 Pet. 24-25; 96-1028 Pet. 21-24; 96-7227 Pet. 5-12) that their convictions on Count 3 for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) are invalid because the jury acquitted them of the predicate crime of violence charged in Count 1. That contention is without merit and does not warrant review by this Court.

a. The courts of appeals uniformly agree that a defendant need not be charged with or convicted of the predicate crime in order to be convicted under Section 924(c)(1) of using or carrying a firearm during and in relation to that predicate crime. See, *e.g.*, *United States* v. *Bracy*, 67 F.3d 1421, 1430 (9th Cir. 1995); *United States* v. *Anderson*, 59 F.3d 1323, 1326 (D.C. Cir.) (en banc), cert. denied, 116 S. Ct. 542 (1995); *United States* v. *Ospina*, 18 F.3d 1332, 1336 (6th Cir.), cert. denied, 512 U.S. 1226 (1994); *United States* v. *Thomas*, 12 F.3d 1350, 1362-1363 (5th Cir.), cert. denied, 511 U.S. 1095, 1114 (1994); *United States* v. *Frayer*, 9 F.3d 1367, 1372 (8th Cir. 1993), cert. denied, 115 S. Ct. 77 (1994); *United States* v. *Hill*, 971 F.2d 1461, 1464 (10th Cir. 1992) (en banc). Rather, "it is only the fact of the offense, and not a conviction, that is needed to establish the required predicate [crime under Section 924(c)(1)]." *United States* v. *Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.), cert. denied, 498 U.S. 824 (1990). That conclusion follows from the text of Section 924(c)(1).

Section 924(c)(1) makes it an offense when a person, "during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm." Thus, the language of the statute applies whenever a defendant "may be prosecuted" for covered predicate crimes; application of the statute is not limited to predicate crimes

for which the defendant has been convicted. See *United States* v. *Ospina*, 18 F.3d at 1335-1336.

As petitioners point out (96-989 Pet. 24; 96-1028 Pet. 23; 96-7227 Pet. 5), Section 924(c)(1) further provides that any punishment imposed thereunder "shall [be] in addition to the punishment provided for such crime of violence or drug trafficking crime," and that "the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried." Contrary to petitioners' contention, however, neither of those sentencing provisions compels the conclusion that a defendant must be convicted of the predicate crime in order to be convicted under Section 924(c)(1). Rather, those provisions simply make clear that where a defendant *is* charged with and convicted of the predicate crime, his sentence under Section 924(c)(1) must run consecutively to the sentence imposed for the predicate offense. See *United States* v. *Gonzalez*, No. 95-1605 (Mar. 3, 1997), slip op. 8 ("[W]hen a defendant violates § 924(c), his sentencing enhancement under that statute must run consecutively to all other prison terms.").

b. The fact that petitioners were charged with and acquitted of the predicate offense does not alter the analysis. When a jury convicts a defendant under Section 924(c)(1) but acquits him of the predicate crime, the jury has simply returned inconsistent verdicts.[10] This Court made clear in *United States* v. *Powell*, 469 U.S. 57, 65

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[10] The jury in the instant case was instructed that it could convict petitioners on the Section 924(c)(1) charges only if it found that the government had proved beyond a reasonable doubt that petitioners had "committed the crime alleged in Count One of the Indictment." 96-7227 Pet. App. 177a.

(1984), that such inconsistency does not warrant reversal of an otherwise valid conviction:

> [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise or lenity, arrived at an inconsistent conclusion on the lesser offense.

The Court further explained that "a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67. Thus, a defendant's conviction under Section 924(c)(1) is valid so long as the government presented sufficient evidence at trial to prove the predicate offense as an element of the Section 924(c)(1) violation, even when the defendant is acquitted of the predicate crime. See *United States* v. *Bracy*, 67 F.3d at 1430-1431; *United States* v. *Frayer*, 9 F.3d at 1372; *United States* v. *Ruiz*, 986 F.2d 905, 911 (5th Cir.), cert. denied, 510 U.S. 848 (1993); *United States* v. *Laing*, 889 F.2d 281, 288-289 (D.C. Cir. 1989), cert. denied, 494 U.S. 1008, 1069 (1990).

After reviewing the record in this case, the court of appeals ruled that the evidence was sufficient to support a finding that petitioners committed the predicate crime of conspiring to murder federal agents. Pet. App. 64a-70a. Petitioners do not directly challenge that ruling here.[11]

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[11] Petitioners assert (96-989 Pet. 25 n.13; 96-7227 Pet. 9-10) that the court of appeals' decision conflicts with *United States* v. *Lucien*, 61 F.3d 366 (5th Cir. 1995). In that case, the jury acquitted the defendant on one drug count, but convicted him on a second drug count and on a Section 924(c)(1) count. The court of appeals reversed the defendant's conviction on the second drug count because the district court had failed to give a lesser-included-offense instruction at trial. *Id.* at 373-377. The

Accordingly, they were properly convicted under Section 924(c)(1).

2. Petitioners Castillo, Whitecliff, Branch, Avraam, and Craddock contend (96-989 Pet. 5-20, 25-30; 96-1028 Pet. 12-21; 96-7227 Pet. 13-26) that the type of firearm used or carried is an element of the Section 924(c)(1) offense that must be submitted to the jury rather than a sentencing enhancement factor that may be determined by the court. The court of appeals correctly rejected that contention. Although the court's decision conflicts with a decision of the Ninth Circuit, review by this Court is not warranted at the present time in light of the current interlocutory posture of the case.

a. In pertinent part, Section 924(c)(1) provides:

> Whoever, during and in relation to any crime of violence * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence * * *, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

As this Court has observed, the statute requires the government to prove (1) "that the defendant 'use[d] or carrie[d] a firearm,'" and (2) "that the use or carrying was 'during or in relation to' a 'crime of violence or drug

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court then summarily concluded that the defendant's conviction on the Section 924(c)(1) count "cannot stand." *Id.* at 377. In denying the petitions for rehearing in this case, the court of appeals correctly distinguished *Lucien* on the ground that it "presented a factually different situation where instructional error in a predicate offense infected the conviction under 18 U.S.C. § 924(c)(1)." Pet. App. 117a-118a. In any event, even if the Fifth Circuit's decision in this case conflicted with its decision in *Lucien*, an intracircuit conflict would not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

trafficking crime.'" *Smith* v. *United States*, 508 U.S. 223, 227-228 (1993). In light of the language and structure of the statute, the type of firearm used or carried is not an essential element of the offense; it is instead a factor that determines the length of the sentence. Cf. *Bailey* v. *United States*, 116 S. Ct. 501, 505 (1995) ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm.'"); *Smith* v. *United States*, 508 U.S. at 227 ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.'").[12]

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[12] Petitioners' reliance (96-989 Pet. 9-10; 96-1028 Pet. 14) on *Deal* v. *United States*, 508 U.S. 129 (1993), is misplaced. The issue in *Deal* was whether multiple convictions under Section 924(c)(1) in a single proceeding triggered the enhanced sentences in the second sentence of Section 924(c)(1), which provides stiffer sentences "[i]n the case of [a] second or subsequent conviction." See 508 U.S. at 131. This Court concluded that the term "conviction" in that context "refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *Id.* at 132. Since the first sentence of Section 924(c)(1) makes no reference to a "conviction," this Court's ruling in *Deal* has no bearing on the issue in this case.

Nor is there merit in petitioner Castillo's claim (96-989 Pet. 25-28) that the court of appeals' decision violates his constitutional rights to be charged by indictment and to be tried by a jury. An indictment charging a violation of Section 924(c)(1) satisfies the Fifth Amendment when it alleges the essential elements of the offense, namely, that a defendant used or carried a firearm during and in relation to a crime of violence or a drug trafficking crime. See *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). Treating the type of firearm used or carried as a sentencing enhancement factor does not deprive a defendant of his Sixth Amendment right to have the jury determine every essential element of the offense. See *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986) ("[W]e need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

b. We acknowledge, however, that the court of appeals' decision in the instant case conflicts with a decision of the Ninth Circuit. That court has held that, "[i]f the 30-year consecutive sentence is to be imposed under section 924(c)(1), the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime." *United States* v. *Alerta*, 96 F.3d 1230, 1235 (1996). Other courts have also indicated that the jury must determine which type of firearm was used or carried under Section 924(c)(1). In *United States* v. *Melvin*, 27 F.3d 710, 714 (1994), the First Circuit noted with apparent approval the government's concession in that case "that a defendant found guilty of violating § 924(c) may be sentenced to a thirty-year term only if the jury specifically identifies a machine gun or silencer as the firearm supporting the conviction." The Sixth Circuit has also stated in dicta that imposition of the enhanced 10- and 30-year penalties under Section 924(c)(1) requires a jury finding as to the type of firearm used or carried. See *United States* v. *Sims*, 975 F.2d 1225, 1235-1236 (1992), cert. denied, 507 U.S. 832, 998, 999 (1993).

In light of the current interlocutory posture of the case, however, review by this Court is not warranted at the present time. The court of appeals vacated each petitioner's sentence under Section 924(c)(1) and remanded the case for further proceedings in the district court to determine whether members of the conspiracy actively employed machineguns. Pet. App. 86a, 98a. It thus remains to be seen whether petitioners will be sentenced under the machinegun provisions of Section 924(c)(1). After petitioners have been resentenced on Count 3, they will have a further opportunity to contest their sentences in the court of appeals and, if necessary, in this Court. Accordingly, review by this Court would be premature at the present time.

3. Petitioners Castillo, Branch, Avraam, and Craddock contend (96-989 Pet. 20-24; 96-7227 Pet. 27-30) that the district court erred in imposing enhanced 30-year sentences

under Section 924(c)(1) based on their co-conspirators' use of machineguns, firearms with silencers, and hand grenades during the conspiracy to murder federal agents. The court of appeals' resolution of that issue is correct and does not conflict with any decision of this Court or of another court of appeals. Because the court of appeals remanded for further findings and for resentencing, moreover, review by this Court would be premature at the present time.

In the circumstances of this case, the court of appeals correctly concluded that use of enhanced weapons by petitioners' co-conspirators would be a sufficient basis for imposition of enhanced 30-year sentences on Count 3. The predicate crime of violence charged in Count 3 was a conspiracy to murder federal officers, in violation of 18 U.S.C. 1114 and 1117. See 96-7227 Pet. App. 176a. By convicting petitioners on Count 3, the jury necessarily found that petitioners were members of a conspiracy to murder federal agents. Under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640, 645-648 (1946), a member of a conspiracy may be held responsible for the acts committed by a co-conspirator in furtherance of the conspiracy.[13] As the

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[13] The *Pinkerton* doctrine is usually applied under Section 924(c)(1) to permit a jury to find a defendant guilty of violating that provision based on a co-conspirator's use of a firearm. See, *e.g.*, *United States* v. *Myers*, 102 F.3d 227, 237-238 (6th Cir. 1996); *United States* v. *Dean*, 59 F.3d 1479, 1489-1490 (5th Cir. 1995), cert. denied, 116 S. Ct. 748, 794 (1996); *United States* v. *Williams*, 31 F.3d 522, 526 (7th Cir. 1994). In this case, independent evidence established that petitioners had themselves used firearms during the gun battle with the ATF agents on February 28, 1993. Pet. App. 71a-72a. The validity of petitioners' convictions is therefore not dependent on application of the *Pinkerton* doctrine. The question instead is whether the district court, in sentencing petitioners on the Section 924(c)(1) count, may hold petitioners accountable for the *types* of weapons used by other members of the conspiracy. Petitioners offer no reason why *Pinkerton* principles should not apply in that context. Cf. Sentencing Guidelines § 1B1.3(a)(1)(B) (defining conduct for which the defendant is held accountable at sentencing to include "in the case of a jointly undertaken criminal activity * * * all

court of appeals noted, "there is evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy in the firefight of February 28." Pet. App. 86a. The court of appeals therefore properly concluded that, "[s]hould the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Ibid.*

Contrary to petitioner Castillo's claim (96-989 Pet. 20-24), the court of appeals' decision does not conflict with *Bailey* v. *United States*, 116 S. Ct. 501 (1995). At sentencing, the district court ruled that petitioners were subject to enhanced 30-year sentences on Count 3 for two reasons. Relying on the "fortress theory," the district court first concluded that "[e]ach [petitioner] either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege." Pet. App. 124a. Alternatively, the court concluded that each petitioner could be held accountable for a co-conspirator's use of an enhanced weapon under the *Pinkerton* doctrine. *Id.* at 125a-127a.

After petitioners were sentenced, this Court decided in *Bailey* that a conviction for using a firearm under Section 924(c)(1) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 116 S. Ct. at 505.[14] As the court of appeals correctly observed, the district court's finding "that each [petitioner] had actual or constructive possession of an enhanced weapon" was insufficient under *Bailey* to establish that petitioners had "used" an enhanced weapon. Pet. App. 86a. The propriety of petitioners' sentences under *Pinkerton* principles de-

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reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity").

[14] The court of appeals held that the evidence at trial in this case was sufficient to show that each petitioner "actively employed" a firearm within the meaning of *Bailey*. Pet. App. 71a-72a. None of the petitioners challenges that holding in this Court.

pends on whether machineguns or other enhanced weapons were "used," within the meaning of Section 924(c)(1) (as that term was construed in *Bailey*) by other members of the conspiracy. *Ibid.* The court of appeals correctly remanded the case to the district court to determine whether any such active use occurred. The court of appeals also directed the district court to consider on remand "whether [petitioners] actively employed [an enhancing] weapon during and in relation to the conspiracy to murder federal agents." *Ibid.*

Thus, petitioners' challenge to the application of the *Pinkerton* doctrine—like their other challenge to their sentences on Count 3—is not presently ripe for review. If the district court on remand applies *Pinkerton* in sentencing them, they will have an opportunity to challenge their sentences in the court of appeals and, if necessary, in this Court. If the district court concludes, however, that none of petitioners' co-conspirators actively employed machineguns or other enhanced weapons in furtherance of the conspiracy, the *Pinkerton* doctrine will be inapplicable to this case. Conversely, if the district court determines on remand that petitioners themselves used or carried machineguns or other firearms requiring an enhanced sentence under Section 924(c)(1), petitioners will be subject to enhanced 30-year sentences on that basis, irrespective of their co-conspirators' use of such weapons. In those events, questions concerning the proper scope and application of the *Pinkerton* doctrine would ultimately be irrelevant to petitioners' sentences. Review by this Court would therefore be premature at the present time.

4. Petitioner Whitecliff contends (96-1028 Pet. 9-12) that the district court erred in failing to instruct the jury that self-defense or the defense of others was a defense to the voluntary manslaughter charge. The court of appeals correctly rejected that contention, and it does not warrant further review.

a. In *United States* v. *Feola*, 420 U.S. 671, 679, 684 (1975), this Court noted that 18 U.S.C. 1114, which prohi-

bits the killing of federal officers, and its counterpart, 18 U.S.C. 111, which prohibits assaults on federal officers, were enacted to give "maximum protection to federal officers" and to create "the highest possible degree of certainty" that those who forcibly impede officers in the performance of their duties will be brought to justice. The absence of self-defense is not an element of the offenses under those federal statutes. Rather, self-defense is an affirmative defense on which the defendant bears the burden of production. If the defendant produces evidence in support of a claim of self-defense, the government bears the burden of persuasion and must prove the absence of self-defense beyond a reasonable doubt. *United States* v. *Alvarez*, 755 F.2d 830, 842-843 & n.12 (11th Cir.), cert. denied, 474 U.S. 905 (1985), 482 U.S. 908 (1987); *United States* v. *Johnson*, 542 F.2d 230, 232 n.4 (5th Cir. 1976).

"As a general proposition," this Court has explained, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews* v. *United States*, 485 U.S. 58, 63 (1988). The court need not, however, instruct the jury regarding a defense that is so lacking in evidentiary support that no reasonable jury would accept it. See, *e.g.*, *United States* v. *Perez*, 86 F.3d 735, 736 (7th Cir. 1996); *United States* v. *Streit*, 962 F.2d 894, 898 (9th Cir.), cert. denied, 506 U.S. 962 (1992) (self-defense instruction not required); *United States* v. *Wagner*, 834 F.2d 1474, 1486 & n.12 (9th Cir. 1987) (same); *United States* v. *Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984) (same). Petitioner Whitecliff does not challenge the court of appeals' articulation (see Pet. App. 8a) of the governing legal standard; he simply asserts that the court misapplied that standard to the circumstances of the instant case. See 96-1028 Pet. 9-12. That fact-bound challenge does not warrant this Court's review.

b. In any event, the court of appeals correctly held that petitioners were not entitled to a jury instruction on self-defense with respect to the lesser-included offense of vol-

untary manslaughter because there was insufficient evidence at trial for a rational jury to have a reasonable doubt that petitioners were not acting in self-defense. Pet. App. 16a-30a. The government is not required to prove a defendant's knowledge of a federal officer's official identity as an element of the offense under Section 111 or 1114. See *United States* v. *Feola*, 420 U.S. at 684-686. A defendant may raise a claim of self-defense based on an "honest mistake of fact," however, if there is evidence to show that he did not know the official identity of the officers, he reasonably believed that the officers posed a threat of a hostile and imminent attack, and he used the same amount of reasonable force to defend himself against the officers as he would be justified in using against private citizens. See *United States* v. *Morton*, 999 F.2d 435, 437-438 (9th Cir. 1993); *United States* v. *Streit*, 962 F.2d at 898; *United States* v. *Alvarez*, 755 F.2d at 842-847; *United States* v. *Danehy*, 680 F.2d 1311, 1315 (11th Cir. 1982); *United States* v. *Ochoa*, 526 F.2d 1278, 1281-1282 (5th Cir. 1976); *United States* v. *Young*, 464 F.2d 160, 163 (5th Cir. 1972).

In the instant case, there was no evidence at trial from which a rational jury could have had a reasonable doubt that petitioner Whitecliff knew the official identity of the approaching ATF agents. The evidence showed that Koresh and the other Branch Davidians learned of the ATF's planned raid 45 minutes before the agents arrived. Pet. App. 3a, 16a-17a, 66a; Gov't C.A. Br. 12-13, 85-86. During that period, the Branch Davidians made preparations to repel the agents. Pet. App. 66a-67a; Gov't C.A. Br. 13-15. When they approached the compound, the agents clearly and repeatedly identified themselves as police officers. Pet. App. 17a; Gov't C.A. Br. 86. Moreover, most of the agents wore uniforms with vests that "had a large, gold ATF badge and the words 'ATF' and 'Police' inscribed in bright yellow, inch-high letters on their fronts," and "'ATF' and 'Police' were also emblazoned on the back of the vests in large, yellow letters visible at a distance." Pet. App. 18a; Gov't C.A. Br. 86. Based on that evidence,

the court of appeals correctly concluded that "a reasonable juror could not doubt that [petitioners] knew their targets were federal agents." Pet. App. 15a. See *United States* v. *Moore*, 958 F.2d 646, 649 (5th Cir. 1992); *United States* v. *Ochoa*, 526 F.2d at 1282; see also *United States* v. *Streit*, 962 F.2d at 898; *United States* v. *Alvarez*, 755 F.2d at 844-845 & n.15; *United States* v. *Jackson*, 726 F.2d at 1468.[15]

Nor is there merit in petitioner Whitecliff's claim (96-1028 Pet. 10-12) that he was entitled to a self-defense instruction because there was sufficient evidence to raise a reasonable doubt about whether the ATF agents used excessive force. A defendant who is aware of a government agent's official status may not use force to resist an arrest or the execution of a search warrant, even if the arrest is unlawful or the search warrant is defective. See *United States* v. *Span*, 970 F.2d 573, 579-580 (9th Cir. 1992), cert. denied, 507 U.S. 921 (1993); *United States* v. *Danehy*, 680 F.2d at 1315-1316; *United States* v. *Varkonyi*, 645 F.2d 453, 458-459 (5th Cir. 1981); *United States* v. *Johnson*, 542 F.2d at 233; *United States* v. *Johnson*, 462 F.2d 423, 427-428 (3d Cir. 1972), cert. denied, 410 U.S. 937 (1973); *United States* v. *Ferrone*, 438 F.2d 381, 390 (3d Cir.), cert. denied, 402 U.S. 1008 (1971). Such a defendant may raise a valid claim of self-defense, however, if he reasonably believed that the amount of force used by the officers in making an arrest or executing a warrant was "excessive," and if he used no more force than necessary to defend himself. See *United States* v. *Morton*, 999 F.2d at 438 n.2; *United States* v. *Span*, 970 F.2d at 577-578; *United States* v. *Streit*, 962 F.2d at 898-899; *United States* v. *Middleton*, 690 F.2d

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[15] The "lack of knowledge" defense is typically raised by a defendant's own testimony that he did not know the official status of his victim. See, *e.g.*, *United States* v. *Danehy*, 680 F.2d at 1313; *United States* v. *Ochoa*, 526 F.2d at 1280-1281; *United States* v. *Young*, 464 F.2d at 162 & n.4; see also *United States* v. *Jackson*, 726 F.2d at 1468. Petitioner Whitecliff did not testify at trial in this case, and he introduced no evidence suggesting that he did not know that the individuals attempting to enter the compound were law enforcement agents.

820, 826 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); W. LaFave & A. Scott, *Substantive Criminal Law* § 5.7(h), at 662 (1986 & 1997 Supp.).[16]

Petitioner Whitecliff relies (96-1028 Pet. 11) on the testimony of Kathryn Schroeder and Marjorie Thomas, two Branch Davidians who testified as government witnesses. Schroeder testified that, at the beginning of the raid, gunfire came into a room on the first floor of the building. Pet. App. 27a; Gov't C.A. Br. 31. Thomas testified that a gunshot came through the window into her room on the third floor shortly after she and her roommates saw helicopters approaching. Pet. App. 27a; Gov't C.A. Br. 32. Thomas also testified that she did not know whether the gunshot came from the helicopter. Pet. App. 28a. There was no evidence at trial, however, that petitioner Whitecliff was near either Schroeder's or Thomas's room at any time during the gun battle. There was also no evidence that ATF agents shot at petitioner Whitecliff before he shot at them. The court of appeals therefore properly concluded that no reasonable jury could infer that

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[16] The Fourth Amendment prohibits the use of excessive force by law enforcement officers even when the officers are performing their lawful duties. *Graham* v. *Connor*, 490 U.S. 386, 394-396 (1989); *Tennessee* v. *Garner*, 471 U.S. 1, 7 (1985). This Court made clear in *Graham* that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." 490 U.S. at 395. The Court noted that "Fourth Amendment jurisprudence has long recognized that the right to make an arrest * * * necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* at 396. The Court explained that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* It also emphasized that the "reasonableness" standard "is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

petitioner Whitecliff had acted in self-defense in response to excessive force used by the agents.

5. Petitioner Fatta challenges (96-7265 Pet. 6-12) his convictions on Count 9 for conspiring to possess machineguns and on Count 10 for possessing machineguns, in violation of 18 U.S.C. 371 and 922(*o*). Petitioner argues that Section 922(*o*), which prohibits the transfer or possession of a machinegun, exceeds Congress's power under the Commerce Clause and is therefore invalid. Petitioner primarily relies (96-7265 Pet. 8-12) on this Court's decision in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), which held that Congress exceeded its power under the Commerce Clause when it enacted the Gun-Free School Zones Act, 18 U.S.C. 922(q)(1).

The court of appeals affirmed petitioner Fatta's convictions on Counts 9 and 10 but held the mandate pending the decision of the en banc court in *United States* v. *Kirk*, 70 F.3d 791 (1995), reh'g en banc granted, 78 F.3d 160 (5th Cir. 1996). Pet. App. 7a, 98a. Subsequent to the court of appeals' decision in this case, an equally divided en banc court in *Kirk* affirmed the judgment of the lower court upholding the constitutionality of Section 922(*o*). See *United States* v. *Kirk*, 105 F.3d 997 (5th Cir. 1997). Thus, every court of appeals to consider the issue since this Court's decision in *Lopez* has held that Section 922(*o*) is a valid exercise of Congress's power under the Commerce Clause. See *United States* v. *Rybar*, 103 F.3d 273, 279-285 (3d Cir. 1996); *United States* v. *Kenney*, 91 F.3d 884, 889-891 (7th Cir. 1996); *United States* v. *Beuckelaere*, 91 F.3d 781, 782-787 (6th Cir. 1996); *United States* v. *Rambo*, 74 F.3d 948, 951-952 (9th Cir.), cert. denied, 117 S. Ct. 72 (1996); *United States* v. *Wilks*, 58 F.3d 1518, 1519-1522 (10th Cir. 1995). In the absence of a conflict among the courts of appeals, petitioner Fatta's contention does not warrant further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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